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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 220

JOAN SCHNAUDER and PATRICIA SCHNAUDER, Through JOYCE SCHNAUDER ERNEST, Their Next Friend,

Petitioner,

versus

PEERLESS INSURANCE COMPANY,

Respondent.

REPLY OF PEERLESS INSURANCE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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There was no evidence at all to show that William Ganaway had authority, express or implied, to use the jeep of Charity Hospital for his own purpose, entirely unconnected with the business of Charity Hospital and there was no evidence at all to justify a verdict for plaintiff.

This accident occurred on Sunday morning December 21, 1958 at approximately 9:30 A.M. in the city of New

Orleans. William Ganaway was employed by the Charity Hospital of Louisiana as a mechanics' helper, washed cars, cleaned tools, assisted mechanics when he was told to do so and kept the shop clean. On the Sunday morning of the accident, it was his duty, when instructed, to answer calls for service which may be needed by Charity Hospital vehicles, including ambulances. If an ambulance had a flat tire another ambulance would be sent out and William Ganaway would be ordered to take the Charity Hospital jeep out to repair the tire or tow the Charity Hospital ambulance back to the garage.

William Ganaway and other employees were positively instructed that they were not to use a Charity Hospital vehicle for their private purposes. The record shows that none of the Charity Hospital vehicles needed to be serviced on the day of the accident and that William Ganaway had received no instructions from anyone to use the Charity Hospital jeep. William Ganaway, without any authorization at all from anyone connected with Charity Hospital, took the jeep out of the garage, called on his friend, Mrs. Lillian Schnauder, and was bringing her to Morrison's Cafeteria where she was employed. Before reaching Morrison's Cafeteria, an accident occurred. William Ganaway and Mrs. Lillian Schnauder were both killed. There was no evidence at all to justify a verdict for the plaintiffs against the defendant insurance company under the omnibus clause of the policy or any other possible theory of the case.

The court of appeals correctly said in its reasons for judgment:

> "The liability of Peerless is dependent upon whether Ganaway was an 'insured' under the omnibus clause of the policy which included any person while using the automobile, provided the actual use was with the permission of the named insured."

Plaintiffs did not introduce a single line of evidence to show that William Ganaway was on a mission for the benefit of Charity Hospital. There was not a single line of evidence that showed he had permission to use the vehicle and for the omnibus clause in the insurance policy to be applicable, it was necessary for plaintiffs to show that William Ganaway had original permission to use the jeep of Charity Hospital for his own purpose or for a purpose connected with the business of the hospital.

No one could have given him permission to use the jeep for his own purpose because under the Constitution of Louisiana, Article 4, Section 12, the property of the State of Louisiana cannot be loaned to anyone for private purposes. The records of Charity Hospital were introduced in evidence and showed that not a single vehicle connected with the hospital needed service on the day of the accident. In addition to the official records being introduced in evidence, Mr. Sidney P. Harper, Building Services Supervisor, an employee of Charity Hospital for thirty-seven years, testified that no one has permission to drive a Charity Hospital vehicle for personal reasons and that permission has never been given to an employee to use a vehicle for private purposes.

It will be remembered that William Ganaway was taking his girl to work at Morrison's Cafeteria. Certainly a

mission in no way connected with the business of Charity Hospital. In addition to the records being introduced in evidence which showed that no vehicles called for service, it was also stipulated that the Sisters of Charity attached to Charity Hospital have a vehicle but had no occasion to call for service. Carlton Vass, the License Inspector of Charity Hospital has a vehicle and testified he needed no service that day. Leon Ricks, the driver of the ice truck, testified to the same thing and so did Lawrence Johnson who runs the garbage truck. Dr. Kerne, Superintendent of the hospital, testified the vehicle assigned to him needed no service. In addition to the records which showed that the ambulance drivers did not call for service on the day of the accident, the ambulance drivers all testified to that effect, therefore, there was not a line of evidence to show that William Ganaway had either original or implied permission to use the vehicle for his private purpose. To come under the omnibus clause of an insurance policy, it is necessary to show that William Ganaway had such permission and all of the testimony was to the contrary—not a line otherwise. The employees, of the hospital, knew that they were absolutely prohibited from using the vehicles for private purposes. Under such circumstances, William Ganaway was not an omnibus insured under the policy and the Court of Appeal for the Fifth Circuit very properly analyzed the law of Louisiana.

A sympathetic jury gave one of Mrs. Lillian Schnauder's daughters, $1,000.00 and the younger girl, $9,000.00. There wasn't any evidence to justify the verdict nor was there negligence on the part of William Ganaway. This was an intersectional accident and there was no evidence at

all to show that William Ganaway did not stop for the stop sign or that he did not enter the intersection first. Not a single witness testified that William Ganaway did not stop for the stop sign. In fact, the testimony showed that he had pre-empted the intersection and had the right of way, and that he was either stopped at the time of the accident or traveling from two to five miles an hour and the sole cause of the accident was the negligence of the negro named, Manuel Powe, who was traveling at a speed of twenty-five to possibly forty miles an hour on a narrow, congested street with cars parked on both sides and approaching a two-way busy intersection and failing to keep a proper or adequate look-out or have his vehicle under control. Counsel for plaintiffs in his opening argument to the jury said:

> "This was driven by one Manuel Powe, a Negro, who was, as we understand, doing approximately 30 miles an hour on a 20-mile street. There is no question, we feel, that this Negro was at fault. We feel that there is no question that Mr. Ganaway was at fault in going into a favored street through the stop sign." Tr. 20.

Even Manuel Powe didn't know if Ganaway stopped for the stop sign.

We heretofore pointed out there was not a word of evidence to the effect that William Ganaway did not stop at the stop sign.

Plaintiffs' counsel has attempted to show that William Ganaway was on the way back to the hospital, inasmuch

as he was only three blocks away and, therefore, the re-entry doctrine is applicable, however, the record shows that he could not have continued on the street where the accident happened to get to the Charity Hospital because there was a traffic sign arrow which changed the direction of traffic and the street no longer was a one way street headed to Charity Hospital and traffic on that street one block from the scene of the accident was one way and that one way was away from the hospital, however, the re-entry doctrine has no application at all under the omnibus clause of the insurance policy, unless there was original permission to use the jeep and all of the evidence is to the contrary.

Plaintiffs' counsel argued to the jury that William Ganaway was apparently out on a call and saw Mrs. Schnauder, apparently picked her up:

> "He was apparently out on a call and saw Mrs. Schnauder, apparently picked her up—we won't ever know exactly what happened for the simple reason that both of these people, Mr. Ganaway and Mrs. Schnauder, were both killed in this particular accident." Tr. 19.

Counsel for plaintiffs never showed at anytime that William Ganaway was on a call involving business of Charity Hospital and even though he failed to prove that William Ganaway was on business for Charity Hospital, the defendant conclusively proved by its records and witnesses that there were no calls for service on this Sunday morning and that Ganaway had no authority, express or implied to use the Charity Hospital jeep and therefore was not an omnibus insured under the insurance policy.

CONCLUSION.

In accordance with Rule 19 of this Honorable Court a writ of certiorari will be granted only where there are special and important reasons therefor and Rule 19 indicates the character of reasons which will be considered.

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

None of the above is applicable to this case. This is purely and simply an automobile accident. The driver of the Charity Hospital jeep never had original, express or implied permission to use the jeep and, therefore, was not an omnibus insured under the public liability policy.

The Court of Appeal for the Fifth Circuit has ably analyzed the law with reference to the omnibus clause of an insurance policy and it is not necessary that we do more than say that we think the opinion of the Court of Appeal is in accordance with the law of Louisiana and is eminently correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the above and foregoing has been delivered to Mr. A. H. Reed, Maison Blanche Building, New Orleans 16, Louisiana, Counsel for Petitioner, and to Hattier, Schroeder & Kuntz, Of Counsel for Petitioners, 1314 Richards Building, New Orleans 12, Louisiana.

July 26, 1961.

WILLIAM A. PORTEOUS, JR.